

**BEFORE THE APPEALS BOARD
FOR THE
KANSAS DIVISION OF WORKERS COMPENSATION**

MARC A. TIPTON

Claimant

VS.

MCDONALDS

Respondent

AND

**KANSAS RESTAURANT &
HOSPITALITY ASSOCIATION**

Insurance Carrier

Docket No. 1,012,418

ORDER

Claimant requests review of the November 17, 2003 preliminary hearing Order entered by Administrative Law Judge Bruce E. Moore.

ISSUES

The Administrative Law Judge (ALJ) entered his Order denying claimant benefits on November 17, 2003. That same day the claimant filed an application for review raising the issues of whether he met his burden of proof to establish he suffered accidental injury arising out of and in the course of employment as well as whether he provided timely notice of his alleged accidental injury. The administrative file further reflects that on December 2, 2003, the ALJ granted claimant's attorney's motion to withdraw as attorney of record for the claimant. No other attorney has entered an appearance for the claimant. Therefore, the claimant appears pro se on his request for review of the preliminary hearing Order.

The ALJ found the claimant had failed to sustain his burden of proof that his accidental injury arose out of and in the course of employment and therefore benefits were denied.

The claimant requests review of whether the claimant's accidental injury arose out of and in the course of employment and whether the claimant provided timely notice.

Respondent argues the ALJ's Order should be affirmed.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

Having reviewed the whole evidentiary record filed herein, the Board makes the following findings of fact and conclusions of law:

Claimant was employed by respondent on August 17, 2002. He described his job duties as preparation of food and customer service orders. Claimant testified that on June 26, 2003, he was preparing an order and as he returned to the work table his left foot "jolted from underneath me forward" and he landed on his right foot. He later testified that his right foot slipped. Claimant finally testified that his left foot went forward and he caught himself on his right foot in a crouched position. Claimant testified that he attempted to tell his manager that he was injured but that he ultimately did not tell anybody that day about what had happened.

Claimant then testified that no one was around when he slipped. Claimant testified that he told the manager that he was hurt. He stated that he tried to tell the manager how he was injured but she told him if he did not complete the order he was working on that he would be asked to leave. Claimant did not complete the order and was asked to leave.

Before he left work he did not ask for medical treatment. But when he got home the claimant called his primary care physician and scheduled an afternoon appointment that day. Claimant testified that he told the doctor what had happened. Claimant testified his doctor prescribed Tylenol, told him to stay off his feet and referred claimant to an orthopedist.

Claimant testified that he called respondent and talked to the shift manager on June 28, 2003. Claimant told the manager that he was not going to work because of his injury on June 26, 2003. Claimant admitted that he did not tell the shift manager that it was a work-related injury.

Claimant admitted that he had been disciplined on more than one occasion due to work performance problems. And the claimant admitted that on the morning of June 26, 2003, he had been sent home from work for failing to perform his duties as well as insubordination. Claimant later testified that he had been suspended for a week.

The claimant alleged the slip and near fall accident occurred at approximately 10 or 10:15 in the morning. But the payroll records indicate that claimant clocked out at 9:34 a.m. Claimant denied that he saw an attorney that day.

Claimant then testified that the shift manager was within a few feet of him when he suffered the slip and near fall incident. He further testified that there was no wet spot on the floor. But the application for hearing alleged he slipped on a wet spot. Claimant finally testified that he assumed he slipped on something on the floor. It was also claimant's final

testimony that he did not know where the manager was when the slip and near fall incident occurred.

Claimant testified that he told Dr. Verlin K. Janzen what had occurred at work. He further testified that the doctor advised him not to return to work. But Dr. Janzen's contemporaneous record of the June 26, 2003 examination indicated claimant gave a history that he was sent home because he was unable to work because of severe back pain. There is no mention of a work-related injury or slip and near fall. Although claimant asked for a note taking him off work, the doctor told claimant that he did not feel there were any medical contraindications to claimant working. Moreover, the doctor's record indicates claimant had talked to workers compensation as well as an attorney.

The general manager, Val Lamb, testified that claimant was sent home and suspended from work on June 26, 2003. The suspension was until June 30, 2003, and claimant was to report back to work on that date. On June 28, 2003, claimant had called and indicated that he was not returning to work but did not mention a work-related injury. It was then discovered that claimant had filed an unemployment claim before his employment had ceased.

The ALJ explained the factual basis for his findings as follows:

THE COURT: Thank you.

Mr. Tipton, if I tried to catalog all the inconsistencies, all the things that don't make any sense, we'd be here all day. It appears clear and uncontroverted that you were sent home on June 26th because of insubordinate behavior. You acknowledge you never reported any accident. At one point you're telling me the accident happened while your manager was just a few steps away, and in the next breath you're telling me you don't know where she was when you fell within a foot of the floor.

You go to the doctor on June 26th and you tell him you were sent home because of back pain, and that's not true. You were sent home because of your behavior. You never even reported any back pain. You relate to the doctor that you've already seen worker's compensation, an attorney, Social Security, and they recommend that you get a professional opinion. You give no history of any injury at work.

You have an examination that is indicative of no injury whatsoever. You have a normal lordotic curve, full extension, flexion, lateral bending and twisting, no evidence of pain, no evidence of restricted movement. You can twist, lateral bend, flex and extend well, straight leg raises are negative, knee and ankle jerks are 1 to 2 positive symmetric, good foot and great toe dorsal flexion. Able to toe walk, heel walk, duck walk and squat. Impression says: Complaints of severe back pain with no physical or objective findings on examination.

You write a letter to the respondent on July 15, and even though you testify that you wrote that letter after consulting with the Division of Worker's Compensation and they told you to write the letter and be specific about what had happened to you, you give no indication of a June 26th, 2003, slip and near fall, but rather you talk about repetitive work caused injury and a date of disablement of June 28th, 2003. None of this is consistent with your testimony that you suffered a specific injury on June 26th, 2003, in a slip and near fall.

From the evidence and testimony presented, Mr. Tipton, I don't believe much of anything you said from this chair up here, and I'm going to deny your claim and find that you failed to sustain your burden of proof of establishing that you suffered an injury, that any injury that you suffered arose out of and in the course of employment.

And I'm, frankly, suspect that you gave appropriate notice. You say you told Ed on Saturday, but the whole reason for your call on Saturday, when you weren't expected, according to your testimony, to return to work for another week doesn't make any sense. And Ed certainly doesn't have any recollection of a report of accident.

And given your own letter of July 15, 2003, the Court has to question whether you gave anyone a specific description of an accident with the particulars of that accident in a timely fashion, and you've certainly not demonstrated any just cause. That you've been in contact with the Division of Worker's Compensation early on, it would appear, based upon your medical records and your letter. I find no merit to your claim whatsoever, and your claim is forthwith denied.¹

The Board has reviewed the evidence and concurs in every respect with the ALJ's findings. The ALJ noted and the Board agrees that claimant's credibility has been significantly compromised by his inconsistent testimony, the statements made by him to the health care providers as well as the contradictory testimony provided by respondent's manager. As a result, the Board finds no justification for disturbing the ALJ's Order.

WHEREFORE, it is the finding of the Board that the Order of Administrative Law Judge Bruce E. Moore dated November 17, 2003, is affirmed.

IT IS SO ORDERED.

Dated this _____ day of January 2004.

BOARD MEMBER

¹ P.H. Trans. at 62-65.

c: Marc A. Tipton, Pro Se, 515 N. Walnut, Apt. 2, Hutchinson, KS 67501
Jeffery R. Brewer, Attorney for Respondent and its Insurance Carrier
Bruce E. Moore, Administrative Law Judge
Anne Haught, Acting Workers Compensation Director